

REC'D TN
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98-00018

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FAX TRANSMISSION COVER SHEET

MRP

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TO: L. Vincent Williams, Esq. Fax #: (615) 741-8724
Richard Collier, Esq. Fax#: (615) 741-5015
Gary Hotvedt, Esq. Fax#: (615) 741-2336
Rochelle Weisburg, Esq. Fax#: (212) 752-8393

FROM: Walter E. Diercks, Esq.

DATE: April 14, 1999

PAGES: 7 including coversheet.

COMMENTS:

If a problem of clarity of transmission arises, please call Adrienne at (202) 861-0870.

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OFFICE OF THE
EXECUTIVE SECRETARY

April 13, 1999

By Federal Express for April 14, 1999 AM Delivery

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: **Docket No. 98-00018**
Notice of Filing Briefs Dated April 7, 1999 and
Order Reflecting Action Taken at April 6, 1999 Authority Conference

Dear Mr. Waddell:

This letter is in response to the April 7, 1999 Order Reflecting Action Taken at April 6, 1999 Authority Conference (the "April 7 Order") and the April 7 Notice of Filing Briefs (the "April 7 Notice").

The April 7 Order acknowledged the Authority's receipt of my April 2, 1999 letter which stated, in pertinent part:

Please be advised that the instant Show Cause proceeding has been automatically stayed by Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362. I call to the Authority's attention *Fugazy Express, Inc. v. Shimer*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992). Any issue regarding the scope and effect of the automatic stay and any request for relief from the automatic stay must be presented to and resolved by the United States Bankruptcy Court for the District of New Jersey, Newark Division.

The exceptions to the automatic stay set out in 11 U.S.C. Section 362 are to be read narrowly. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581 (9th Cir. 1993). In addition, the *Fugazy* case clearly establishes that the automatic stay applies to the instant Show Cause proceeding and that no exception to the automatic stay is applicable in the instant case. *Fugazy*, 124 B.R. at 431.

In her April 5, 1999 letter to Mr. Frankel written on behalf of the Authority, Ms. Kathleen Ayres asserted, based on purported Second Circuit authority, that the Authority retains the authority to decide whether the automatic stay applies to the instant proceeding. The sole case cited by Ms. Ayres only stands for the proposition that a federal court in which litigation is pending has the authority to decide whether the proceeding pending before it is subject to the automatic stay. *Erti, et al. v. Paine Webber Jackson & Curtis, et al.*, 765 F.2d 343 (2d Cir. 1985). The Authority is a State regulatory agency, not a federal court, and thus the precedent relied upon by Ms. Ayres in her

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Mr. K. David Waddell
April 13, 1999
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April 5, 1999 letter written on behalf of the Authority is inapposite and cannot be relied upon by the Authority. Thus, the Authority acts at its own peril if it presumes to have the power to decide on its own whether the automatic stay is applicable.

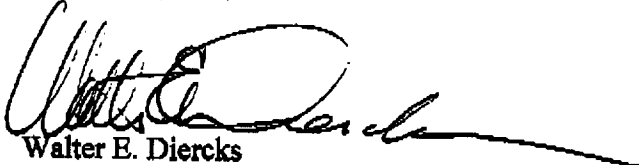
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Please be further advised that this letter is not a waiver by MRP of any of its rights to raise any objection or issue it may have with respect to the conduct of the Authority or of the Tennessee Attorney General taken on behalf of the Authority, including but not limited to:

1. The conflict of interest presented by the Tennessee Attorney General representing the Authority in a matter in which the Tennessee Attorney General has intervened as a party (See, April 5, 1999 letter from Kathleen Ayres, a copy of which is attached hereto as Exhibit 1);
2. The apparent *ex parte* communications between the Authority and the Tennessee Attorney General on the issues raised in my April 2, 1999 letter, which are evidenced by Exhibit 1;
3. The issue of prejudgement by the Authority of the issue which is the subject of the April 7 Order and the April 7 Notice, which also is evidenced by Exhibit 1.

I request that this letter be placed in the docket for the above-captioned proceeding.

Very truly yours,



Walter E. Diercks

cc: L. Vincent Williams, Esq. (with enclosures)
Gary Hotvedt, Esq. (with enclosures)
Rochelle Weisburg, Esq. (with enclosures)
Richard Collier, Esq. (with enclosures)

EXHIBIT 1

ATTORNEY GENERAL TAX

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Apr 5 '99 14:21

P.02

STATE OF TENNESSEE

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April 5, 1999

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BY FACSIMILE: (212) 752-8393 and U.S. MAIL
Bruce Frankel, Esq.
Angel & Frankel, P.C.
460 Park Avenue
New York, N.Y. 10022-1906

Re: Tennessee Regulatory Authority Show Cause Proceeding
Against Minimum Rate Pricing, Inc. TRA Docket No. 98-00018
Bankr. Case No. 99-32136, District of New Jersey

Dear Mr. Frankel:

I am in receipt of a copy of the letter and facsimile of April 2, 1999, from Walter B. Diercks to the Tennessee Regulatory Authority. Since his letter asked that any response be directed to you, I am doing so.

Please be advised that the position of the Tennessee Regulatory Authority is that it is not bound by *Shimer v. Fugazy*, the case cited by Mr. Diercks. First, this is an old case, and as you know, the exception for the exercise of police and regulatory authority in §362(b) was amended last October to make it clear that exercising control of property of the estate is permissible in the exercise of police and regulatory authority. Second, *Shimer* is distinguishable on its facts. In that case, the FCC simply transferred property. It was not engaged in a determination of whether the debtor had violated its operating authority or operated illegally — activities which might be grounds for revocation of a license. Finally, *Shimer* does not stand for the proposition that only the bankruptcy court can determine the scope of the automatic stay. *Shimer* does not address this issue at all and in fact, the 2nd Circuit long ago determined otherwise. "The Court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the precise question whether the proceeding pending before it is subject to the

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Apr 5 '99 14:22 P.03

Mr. Bruce Frankel

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Allegations before the Tenn. Regulatory Authority against MRP assert continuing violation of Tennessee law. Violation of state law is a violation of federal law through 28 USC § 959, and the State is clearly entitled to exercise its police and regulatory power to protect the it's citizens. Nothing in the Bankruptcy Code suggests that a debtor may reorganize through a continuing pattern of illegal conduct or fund its plan with fraudulently obtained revenue. These are the allegations before the TRA, and it has the authority and jurisdiction to determine whether they are well-founded.

The TRA will not be demanding a payment of sanctions or restitution for consumers in the proceeding presently scheduled for April 6, 1999. However, it can determine whether Tennessee law has been violated. The evidence which the TRA will be considering was presented some time ago -- well before the bankruptcy petition was filed -- and the not-yet-debtor participated fully at that hearing. Whether the Debtor responds to any motion is certainly up to the Debtor. However, failure of a response by the debtor will not stay tomorrow's hearing.

If you have any questions, please feel free to call me.

Sincerely,


Kathleen Ayres
Chief Bankruptcy Counsel

cc: Walter E. Diercks, Esq
K. David Waddell
L. Vincent Williams, Esq.
Richard Collier, Esq.
Gary Hotredt, Esq.

CERTIFICATE OF SERVICE

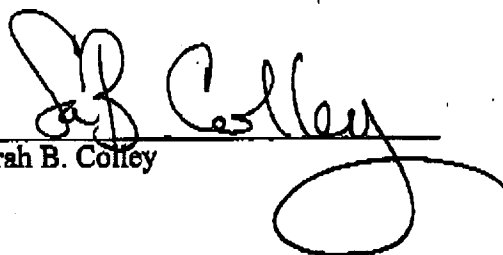
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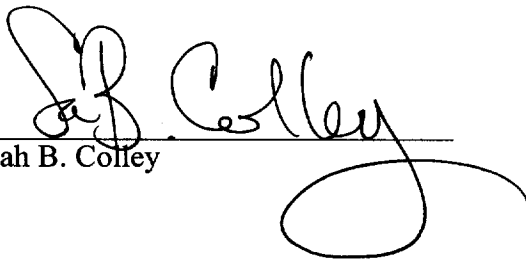
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